

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

<b>BILLY JOE SCALES,</b>	§	
<b>Petitioner,</b>	§	
	§	
<b>VS.</b>	§	<b>CIVIL ACTION NO. 4:07-CV-160-A</b>
	§	
<b>THE STATE OF TEXAS,</b>	§	
<b>Respondent.</b>	§	

**FINDINGS, CONCLUSIONS AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE  
AND NOTICE AND ORDER**

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The findings, conclusions and recommendation of the United States Magistrate Judge are as follows:

**I. FINDINGS AND CONCLUSIONS**

**A. NATURE OF THE CASE**

This is a petition for writ of mandamus by a state prisoner pursuant to 28 U.S.C. § 1651.

**B. PARTIES**

Petitioner Billy Joe Scales, TDCJ #1174119, is a state prisoner in custody of the Texas Department of Criminal Justice in Amarillo, Texas.

Respondent is the State of Texas. No service has issued on Respondent.

**C. DISCUSSION**

By the instant petition for mandamus relief, Scales seeks an order compelling the judge of the Criminal District Court Number One of Tarrant County, Texas, to comply with his request for forensic DNA testing under SB 3. *See* TEX. CODE CRIM. PROC. ANN. chap. 64 (Vernon 2006). His

petition is thus subject to *sua sponte* dismissal under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b).

A federal court lacks “the general power” to issue a writ of mandamus directing state courts and their judicial officers in the performance of their duties and functions where, as here, mandamus is the only relief sought. *Moye v. Clerk, Dekalb County Sup. Ct.*, 474 F.2d 1275, 1275-76 (5<sup>th</sup> Cir. 1973). Thus, this court is without power to enter the requested order. Consequently, the instant petition lacks an arguable basis in law and should be dismissed with prejudice as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B). *See Mitchell v. Texas*, No. 3:05-CV-299-N, 2005 WL 415474, at \*1-2 (N.D. Tex. Feb. 18, 2005) (not designated for publication); *Jon v. Hamlin*, No. 3:04-CV-824-K, 2004 WL 1373157, at \*1-2 (N.D. Tex. June 17, 2004) (not designated for publication); *Cross v. Texas*, No. 3:02-CV-2146-G, 2002 WL 31528481, at \* 1-2 (N.D. Tex. Nov. 8, 2002) (not designated for publication).

## **II. RECOMMENDATION**

It is recommended that the petition for writ of mandamus be dismissed as frivolous.

## **III. NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT**

Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge’s proposed findings, conclusions, and recommendation within ten (10) days after the party has been served with a copy of this document. The court is extending the deadline within which to file specific written objections to the United States Magistrate Judge’s proposed findings, conclusions, and recommendation until April 11, 2007. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge’s proposed findings,

conclusions, and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(B)(1). Failure to file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual finding or legal conclusion accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5<sup>th</sup> Cir. 1996) (en banc op. on reh'g); *Carter v. Collins*, 918 F.2d 1198, 1203 (5<sup>th</sup> Cir. 1990).

#### **IV. ORDER**

Under 28 U.S.C. § 636, it is ORDERED that each party is granted until April 11, 2007, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation. It is further ORDERED that if objections are filed and the opposing party chooses to file a response, a response shall be filed within seven (7) days of the filing date of the objections.

It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions, and recommendation, be and hereby is returned to the docket of the United States District Judge.

SIGNED March 22, 2007.

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/s/ Charles Bleil  
CHARLES BLEIL  
UNITED STATES MAGISTRATE JUDGE